NO. 21530

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIE PEELE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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TOPICAL INDEX

TABLE OF AUTHORITIES

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT AND STATEMENT OF THE CASE

On August 30, 1954, appellant was convicted in the United States District Court for the Southern District of California, Central Division, upon his plea of guilty to a two-count information charging him with violating Title 18, United States Code, Section 2113(a). He was sentenced on that date, by the Honorable William C. Mathes, to a period of imprisonment of 18 years on Count One and five years on Count Two, said sentences to run consecutively [C. T. 3, 18]. 1/ Appellant had been represented by an attorney at

1/ C. T. refers to Clerk's Transcript of Record on Appeal.

all stages of the proceedings [C. T. 14].

On May 12, 1966, appellant filed a Motion pursuant to Section 2255 of Title 28, United States Code, claiming the United States Attorney had made unfulfilled promises to the petitioner that "if (petitioner) would waive the indictment (Case No. 23740) charging petitioner in violation of Title 18 U. S. C. §2113(d), and would thereafter enter a plea of guilty to an information in two counts, charging petitioner in violation of Title 18, United States Code, Section 2113(a)", the Government would (1) concede that the petitioner had not used a revolver in the perpetration of the offense, and (2) recommend to the court at the time of sentencing that a ten year sentence be imposed on each count, both counts to run concurrently [C. T. 4-5].

On October 31, 1966, the Honorable William M. Byrne, United States District Judge entered an order denying the petitioner's motion [C. T. 18-20].

Appellant filed his Notice of Appeal on October 31, 1966, together with his designation of record on appeal and statement of points [C. T. 21-24].

The District Court had jurisdiction under the provisions of Title 18, United States Code, Sections 2113(a) and 3231, and Title 28, United States Code, Section 2255.

This Court has jurisdiction to review the judgment of the District Court denying appellant's motion pursuant to Title 28, United States Code, Sections 1291, 1294 and 2255.

II

STATUTES INVOLVED

Title 18, United States Code, Section 2113(a) provides, in pertinent part as follows:

> "Whoever, . . . by intimidation, takes . . . from the person or presence of another any property or money . . . belonging to, or in the care, custody, control, management, or possession of, any bank . . . .
>
> "Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both."

Title 18, United States Code, Section 2113(d), provides:

> "Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both."

Appellant's motion, the denial of which is the basis of the instant appeal, was made pursuant to the provisions of Title 28, United States Code, Section 2255, which, in pertinent part, provides:

> "A prisoner in custody under a sentence of a court established by Congress claiming the right

to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . ., or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence."

* * *

"An appeal may be taken to the Court of Appeals from the order entered on the motion as from a final judgment or application for a Writ of Habeas Corpus. . . ."

III

STATEMENT OF FACTS

The Reporter's Transcript of the sentencing proceedings, as set forth in petitioner's motion below, discloses the following exchange between the court, and the Assistant United States Attorney, Mr. Harris:

"MR. HARRIS: In this matter, I have discussed the matter with defense counsel Mr. Rhodes. He is agreeable that the defendant waive indictment, and information to be filed charging the defendant with the violation of Title 18, Section 2213(a).

"It seemed that according to the defendant he had a wooden or plastic pistol rather than an

actual pistol; although the testimony of our witnesses thought it was an actual pistol. On the basis of that he was indicted under Section 2113(d), use of a - - to put a life in jeopardy by use of a dangerous weapon.

"It is agreeable with the Government that an information in the two counts be filed charging him with a violation of 2113(a).

"THE COURT: That will be the same, I take it, as Counts - -

"MR. HARRIS: Three and Four, your Honor.

"THE COURT: Counts Three and Four of the indictment in Case 23740, except omitting the last paragraph, namely, the paragraph that reads, 'In committing the offense heretofore charged defendant Willie Peele did assault and put in jeopardy a life of another person . . ." et cetera.

"MR. HARRIS: That is correct.

"THE COURT: . . . by use of a dangerous weapon or device, namely, a revolver."
(Reporter's Transcript, Los Angeles, California, Monday, August 2, 1954). [C. T. 6-7].

Thereafter, in his Order Denying Motion Pursuant to Section 2255 of Title 28, United States Code, Judge Byrne specifically stated that, even disgarding the affidavits of the two Assistant United States attorneys involved in the proceedings of 1954 denying any promises had been made to petitioner, (1) no hearing on the facts

was necessary in this case and it could be decided solely on the record [C. T. 19]; (2) that the motion and the files and records of the case conclusively showed that the petitioner's plea of guilty was voluntary [C. T. 19]; and (3) that petitioner was entitled to no relief [C. T. 20].

IV

ARGUMENT

NO HEARING WAS NECESSARY WHERE THE MOTION AND THE FILES AND RECORDS OF THE CASE CONCLUSIVELY SHOWED THAT THE PRISONER WAS ENTITLED TO NO RELIEF.

The exitence of power to produce the prisoner does not, of course, mean that he should be automatically produced in every Section 2255 proceeding, or that a hearing need always be held. Whether a prisoner should be produced and a hearing held depends upon the issues raised by the particular case, for Section 2255, Title 28, United States Code, provides that no hearing is necessary where "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief". Cf. United States v. Fleenor, 177 F. 2d 482 (7th Cir. 1949).

In the instant case, the court made a specific finding that such a conclusive showing had been presented, and pointed out that:

> " . . . assuming the truth of petitioner's statement that the United States Attorney promised him that if he entered a plea of guilty to § 2113(a), the

Government would concede that he was not armed with a dangerous weapon, that is exactly what was conceded when the plea was accepted to § 2113(a) and the §2113(d) charge was dismissed." [C. T. 19, the court's emphasis.]

And the order denying petitioner's motion went on to state that:

"... the portion of the transcript quoted by petitioner clearly indicates the court was not under the impression that the charge was that the offense was committed with a loaded revolver when, in reply to counsel's statement, '... it's the defendant's position that he used a plastic pistol and not a revolver, ...,' the court replied, 'that's the reason the information was filed charging him with a violation of § 2113(a), whereas the indictment charged him with a violation of section 2113(d).'" [C. T. 19].

Thus, the record itself disclosed that no alleged promises to the defendant had been violated. The petitioner received exactly what he claimed to have been promised.

Similarly, the record itself belied the petitioner's claim for relief on the grounds of alleged promises of a recommendation by the United States Attorney for a lesser-than-maximum sentence.

Again, the Reporter's Transcript, as quoted in Petitioner's Motion below, indicates that the Assistant United States Attorney representing the Government at the time of sentencing, Mr. Bevan, told the court it was "the Government's position that in respect to a case of this nature the maximum sentence should be imposed" [C. T. 8].

The record does not disclose that this recommendation was objected to either by the defendant or by his attorney at that time. Yet, the petitioner contended, in his motion under Section 2255, that, "The foregoing colloquy between the court and Mr. Bevan, the United States Attorney in the instant case, makes it crystal clear that his previous representation to petitioner on the 2nd day of August, 1954, that he would recommend a sentence of ten (10) years in return for petitioner's pleas of guilty to the information (was made and not honored)." [C. T. 8].

This colloquy served not to support the appellant's contention, but rather it operated as a total discredit. The Government did not recommend a lesser-than-maximum sentence, nor did the Government remain mute -- instead, the maximum sentence was requested by the United States Attorney. In light of the fact that nothing was said to the court, either by the defendant or by his attorney, of any contrary earlier promises, the record can only be viewed as conclusively negating the petitioner's claim. And this posture of the record was further crystallized when the petitioner filed his motion under Section 2255 but never submitted an affidavit of his previous attorney who, the petitioner said, was

present when the Government was supposed to have made the alleged promises.

It has been repeatedly held that where "the factual allegation is contradicted by the record made by the movant during the criminal proceeding, he is entitled to no relief and his motion may be dismissed without a hearing." Lynott v. United States, 360 F. 2d 586, 588 (3rd Cir. 1966).

Here, the defendant and his counsel had every opportunity to tell the court of any promises or coercion used to induce his plea. "A defendant, having been represented by competent counsel, having been given every opportunity and right afforded by the law and having entered a plea of guilty, may not, without some reasonable basis, come into court years later and repudiate his prior plea. It is not the intent of Section 2255 nor the meaning of United States v. Hayman, to require a hearing upon the mere assertion that a prior plea was false." Burgett v. United States, 237 F. 2d 247, 251 (8th Cir. 1956), cert. denied 352 U. S. 1031, 77 S. Ct. 596. In the instant case, almost twelve years had elapsed before any claim was made that the plea was induced by a promise as to sentence. And such claim was directly contradicted by any reasonable reading of the records and files of the case. There was, therefore, no need to hold a hearing. Machibroda v. United States, 368 U. S. 487, 495 (1962).

V

CONCLUSION

A review of the record and files of this case discloses no error prejudicial to the rights of appellant and, accordingly, the judgment below should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ William J. Gargaro, Jr.
WILLIAM J. GARGARO, JR.